

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| ANDREW BRONSKY | : | DETERMINATION |
| | : | DTA NO. 819926 |
| for Revision of a Determination or for Refund of Real | : | |
| Estate Transfer Tax under Article 31 of the Tax Law for | : | |
| the Period November 2002. | : | |

Petitioner, Andrew Bronsky, 161 West 129th Street, New York, New York 10027, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the period November 2002.

On September 28, 2004 and October 1, 2004, respectively, petitioner, appearing *pro se*, and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Kevin R. Law, Esq., of counsel) consented to have the controversy determined on submission without a hearing. All documentary evidence and briefs were due to be submitted by January 20, 2005, which date began the six-month period for issuance of this determination. After due consideration of the record, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner should be granted a refund of real estate transfer tax paid on the transfer of certain real property to him by the New York City Partnership Housing Development Fund Company, Inc.

FINDINGS OF FACT

1. On September 18, 2002, petitioner purchased real property located at 163 West 129th

Street, New York, New York 10027, for \$423,318.00 from the NYC Partnership Housing Development Fund Company, Inc. (“HDFC”). At the time the deed was presented for filing petitioner filed a New York State transfer tax return and paid \$1,694.00.

2. The deed in issue contained several restrictive covenants, which provided that petitioner only use the property for residential purposes; that petitioner not discriminate or segregate based on age, race, religion, sex, color, national origin, ancestry, disability, marital status or sexual orientation in the sale or occupancy of the premises; and that petitioner occupy the premises as his primary residence for a specified period of time. In addition, petitioner executed an enforcement mortgage with the City of New York that contained additional covenants which provided that petitioner had to make an additional payment to satisfy secured and unsecured enforcement notes if the property was sold prior to three years after the transfer. In addition, HDFC retained the right to inspect the property.

2. Although the real property transfer tax return provided for claiming an exemption from tax, none was claimed.

3. On May 12, 2003, petitioner filed a Real Estate Transfer Tax Claim for Refund, dated May 5, 2003, in which he requested a refund of \$1,693.27. Petitioner contended on the claim form that since the property was purchased from a not-for-profit New York City agency, no real estate transfer tax was due. Attached to the claim form were two letters: the first, from the Internal Revenue Service (“IRS”) to HDFC, dated September 25, 1984, informed HDFC that the IRS had determined that it was exempt from Federal income tax under section 501(c)(3) of the Internal Revenue Code; the second letter, from Maria T. Jones, Deputy Commissioner for Legal Affairs of the NYC Department of Finance, to Alex S. Avitabile, Esq., dated February 13, 1995, informed him that deeds to or by HDFC, a tax exempt entity operated exclusively for religious,

charitable or educational purposes, were exempt from New York City real estate transfer tax pursuant to Title II of Chapter 46 of the New York City Administrative Code, in effect as of the date of the letter.

4. By letter dated May 22, 2003, the Division of Taxation denied petitioner's refund request, stating in pertinent part:

Section 1405(a) of the New York State Tax Law states in part, that the state of New York, or any of its agencies, instrumentalities, political subdivision [sic] or public corporations shall be exempt from the payment of the real estate transfer tax. Section 575.9 of the Real Estate Transfer Tax Regulation further clarifies the matter by stating that the exemption for certain governmental organization [sic] or entities does not extend to the grantee: that is, if the exempt governmental entity conveyed title to real property to non exempt individual [sic] or entity, there will be a tax due which is payable by the grantee.

As the grantor, NYC Partnership Housing Development Fund Company, Inc. is exempt, the liability for the tax shifts to you, the grantee. The transaction itself is still subject to tax.

SUMMARY OF PETITIONER'S POSITION

5. Petitioner continues to maintain that, by virtue of HDFC's status as a tax exempt not-for-profit entity, deeds to or by it are exempt from the real estate transfer tax. In addition, petitioner contends that the considerable restrictions placed on the property in the deed and mortgage documents make him an instrumentality of New York State and, therefore, exempt from the real estate transfer tax pursuant to Tax Law § 1405(a)(1).

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 1402(a) there is a tax imposed on conveyances of real property where the consideration for the transfer exceeds five hundred dollars, at a rate of two dollars for each five hundred dollars or part thereof. Tax Law § 1404(a) specifies that the real estate transfer tax shall be paid by the grantor, unless the grantor is exempt from the tax, in which case the grantee shall be liable for the tax.

Tax Law § 1405(a)(1) provides, in pertinent part, as follows:

(a) The following shall be exempt from payment of the real estate transfer tax:

1. The State of New York, or any of its agencies, instrumentalities, political subdivisions, or public corporations

* * *

The exemption of such governmental bodies or persons shall not, however, relieve a grantee from them of liability for the tax.

B. The Division of Taxation's regulations promulgated pursuant to Tax Law § 1405 construed the exemption in an identical manner, specifically providing that the exemption for governmental entities does not extend to a nonexempt individual or entity. (20 NYCRR 575.9[b].) Since petitioner seeks the benefit of this exemption, which, like all tax exemptions, must be strictly and narrowly construed, he bears the burden of demonstrating that he comes within the reach of the exemption. (*See, Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 *lv denied* 37 NY2d 708, 375 NYS2d 1027.)

C. Petitioner contends he is exempt from the tax under two separate theories. The first is based upon the letter from Maria T. Jones, Deputy Commissioner for Legal Affairs of the NYC Department of Finance, to Alex S. Avitabile, Esq., dated February 13, 1995, which stated that deeds to or by HDFC, a tax exempt entity operated exclusively for religious, charitable or educational purposes, were exempt from real estate transfer tax pursuant to Title II of Chapter 46 of the New York City Administrative Code.

The current section of the New York City Administrative Code which contains the same provision is Administrative Code § 11-2106(b)(2). It provides that a deed conveying real property by or to a corporation operated exclusively for religious, charitable or educational

purposes is exempt from the New York City real estate transfer tax as imposed under Administrative Code § 11-2102.

It may well be that the transaction in issue was exempt from the New York City real estate transfer tax pursuant to Administrative Code § 11-2106(b)(2), but the New York State Tax Law does not provide the same exemption. For this reason, petitioner's argument, based upon the February 13, 1995 letter from Deputy Commissioner Jones, is rejected.

D. Petitioner's alternative argument is that he is an "instrumentality" of the City of New York by virtue of the restrictions and covenants set forth in the deed and mortgage documents and, therefore, exempt from tax pursuant to Tax Law § 1405(a)(1).

In *Matter of Friends of the Town of Pelham Public Library, Inc.* (Tax Appeals Tribunal, September 3, 1992 [where petitioner sought exemption from the New York State mortgage recording tax on a mortgage given by a private corporation to petitioner on the ground that petitioner was an instrumentality of the Town of Pelham]), the Tribunal stated:

The fundamental issue in this case concerns whether Friends may be considered an agency or *instrumentality* of the Town of Pelham. If this question is answered in the affirmative, it must then be determined whether a municipality which is the mortgagor is exempt from the mortgage recording tax imposed by Article 11 of the Tax Law (emphasis added).

"To establish an agency or representative relationship there must be a manifestation that petitioners consented to act on behalf of their clients, subject to the latter's control and that the clients authorized this fiduciary relationship" (*Matter of Hooper Holmes, Inc. v. Wetzler*, 152 AD2d 871, 544 NYS2d 233, 235, *lv denied* 75 NY2d 706, 552 NYS2d 929).

Applying this principle, we determine that petitioner has failed to demonstrate that it is an agency or instrumentality of the Town of Pelham. Several factors lead us to this conclusion. First, petitioner has not presented any evidence demonstrating that the Town of Pelham gave its consent to have petitioner's organization act on its behalf as an agency or instrumentality of the Town (*see, Matter of C.E. Towers Co. v. State Tax Commn.*, 135 AD2d 976, 522 NYS2d

384, *lv denied* 71 NY2d 804, 528 NYS2d 829). The mere recognition of the existence of petitioner by the Town does not, by itself, satisfy this inquiry.

Likewise, petitioner herein has not demonstrated that HDFC gave its consent for petitioner to act on its behalf as an agent or instrumentality. Nothing in any of the documents submitted mentions this type of special relationship. Instead, what appears are covenants and restrictions which may be found in any deed or mortgage document between two parties to a real estate transaction, the sum of which does not equal the establishment of an agency relationship.

Nothing in any of the documentation offered by petitioner indicated that an agreement between HDFC and himself had established that he was an agent or instrumentality of HDFC .

The minds of the parties must meet in establishing the agency. Otherwise stated, consent of both principal and agent is necessary to create an agency. (2 NY Jur 2d, Agency, § 17.)

For these reasons, petitioner has failed to establish an entitlement to the exemption under Tax Law § 1405(a)(1).

E. The petition of Andrew Bronsky is denied, and the Division of Taxation's denial of petitioner's application for refund, dated May 22, 2003, is sustained.

DATED: Troy, New York
March 3, 2005

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE